No. 187

In the Supreme Court of the United States

OCTOBER TERM, 1967

MENOMINEE TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
HAROLD S. HARRISON,
Acting Assistant Attorney General,
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General,
ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 187

MENOMINEE TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (App. 5–30) has not yet been reported.

JURISDICTION

The jurisdiction of the Court of Claims was asserted to rest on 28 U.S.C. 1491 and 1505 (App. 1). The judgment of the Court of Claims was entered on April 14, 1967 (App. 5). The petition for a writ of certiorari was filed May 22, 1967, and was granted October 9, 1967. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

TREATY AND STATUTE INVOLVED

The relevant portions of the Treaty of May 12, 1854, 10 Stat. 1064, and of the Menominee Termination

Act of 1954, 68 Stat. 250, as amended, 25 U.S.C. 891–902, are printed in the record appendix (App. 31–35).

QUESTION PRESENTED

Whether the Menominee Termination Act—which ended federal guardianship over the Tribe and subjected its reservation to State jurisdiction—had the effect of abrogating hunting and fishing rights allegedly conferred by federal treaty so as to render the United States accountable in damages.

STATEMENT

In the judgment under review, the Court of Claims dismissed a complaint by the Menominee Tribe of Indians seeking to recover compensation for the alleged taking of hunting and fishing rights (App. 1–4). These rights were claimed under the Treaty of Wolf River of 1854, which set aside substantial acreage as a "permanent home" for the Menominees, with the stipulation that the reservation was "to be held as Indian lands are held" (App. 32). The taking was alleged to have occurred as a consequence of a "Termination Act" enacted by Congress in 1954, 68 Stat. 250, 25 U.S.C. 891–902 (App. 33–35).

The Act provided for the transfer to a tribal corporation of all property held in trust for the Menominees by the United States, pursuant to a plan to be submitted by the Tribe and approved by the Secretary of the Interior. 25 U.S.C. 896–897 (App. 34–35). That transfer became effective on April 29, 1961. 26 Fed. Reg. 3726. Thereafter, according to the Termination Act (25 U.S.C. 899, App. 35)—

> * * * individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. * * *

Subsequent to termination, three Menominee Indians were charged with violation of Wisconsin game laws by hunting deer with an artificial light and transporting a loaded and uncased gun in an automobile. The trial court found the defendants not guilty on the ground that the State of Wisconsin lacked jurisdiction to regulate hunting and fishing within the former Menominee Reservation, now Menominee County (App. 36–50). The Supreme Court of Wisconsin reversed, one judge dissenting. *State* v. *Sanapaw,* 21 Wis. 2d 377, 124 N.W. 2d 41. It held that the Termination Act abrogated any right to be free of State game laws in exercising hunting and fishing rights over the former reservation (App. 61). This Court denied certiorari, 377 U.S. 991.

This suit followed. As already noted, the Court of Claims dismissed the petition upon motion of the United States for summary judgment (App. 5–30). It held that the Treaty of 1854 granted the Menominees "an unqualified right to hunt and fish on the reservation in their own way free from all outside regulation or control" (App. 10) and that this right sur-

vived termination of federal guardianship (App. 12–18). Accordingly, the court concluded that the United States had taken nothing and owed no compensation (App. 25–26).

ARGUMENT

INTRODUCTION AND SUMMARY

I

The posture of this case is unusual. Although the Menominees sued the United States for monetary damages on the theory that valuable hunting and fishing rights had been taken from them by congressional action, and alternatively so argue here, they now primarily urge the Court to affirm the judgment dismissing their claim on the ground that their rights survive unimpaired. And the United States, the only respondent, of course agrees that it owes nothing. Thus, except for the State of Wisconsin which appears as *amicus curiae* and has doubtful standing to interpose its views on the liability of the United States toward its former wards, there is little dispute as to the correctness of the judgment entered by the Court of Claims. In this situation, this Court may dispose of the case on the limited ground that no monetary award is due, the only question on which the ruling under review is authoritative.

II

The court below did not, however, merely rule that the United States was not liable in damages. Expressly disagreeing with the Wisconsin Supreme Court's decision in *State* v. *Senapaw*, 21 Wis. 2d 377,

124 N.W. 2d 41, certiorari denied, 377 U.S. 971, the Court of Claims held that the Menominees "own and possess at the present time the exclusive right to hunt and fish on their reservation free of restriction, regulation, or control by the State of Wisconsin" (App. 26). We speak to that question on the supposition that this Court may deem it appropriate to resolve the fundamental conflict of views between the two courts. In this aspect, the decision turns on the proper construction of a federal treaty and a federal statute and implicates the obligation of the government to keep its promises toward a once dependent people.

The initial question is whether the treaty of Wolf River, stipulating that the ceded acreage was "to be held as Indian lands are held," meant to grant the Menominees a special interest in the wildlife resource of their reservation. The three courts which have considered the matter, together with the petitioner and the State of Wisconsin, have all agreed on an affirmative answer. The next question is the effect of the 1954 Termination Act on the rights conferred by the treaty, whatever their scope—the petitioner invoking the holding of the Court of Claims that they survive unimpaired, Wisconsin supporting the ruling of the State Supreme Court that they were lost upon termination of federal guardianship. For our part, we believe that the Termination Act should not be construed to abrogate whatever rights were granted by the treaty by permitting the State to treat the fish and game of the Menominee lands as subject to the same plenary power of regulation as applies elsewhere. On the other hand, we do not read the 1854 Treaty as grant-

ing an absolute immunity from all outside regulation of hunting and fishing and accordingly conclude that the State—now standing in the shoes of the United States—may impose limited restrictions if necessary.

A. THE TREATY OF 1854 MAY FAIRLY BE READ AS GRANTING TO THE TRIBE A SPECIAL PROPERTY INTEREST IN THE WILDLIFE OF THE RESERVATION, BUT NOT AN ABSOLUTE IMMUNITY FROM GOVERNMENTAL REGULATION OF HUNTING AND FISHING

Undoubtedly, in 1854, and for more than a century thereafter, the Menominee Indians were in fact free to hunt and fish as they pleased on their lands. Did that situation prevail only because the status of the Menominee Reservation as a sort of federal "enclave" was viewed as ousting State game laws and because the national authorities—although they had power to do so—did not attempt to regulate hunting and fishing within the area? Or did this uninhibited freedom of the Tribe with respect to hunting and fishing stand on a less precarious footing, the Treaty of Wolf River? That question is relevant since no one suggests that compensation would be due if the Indians' practical immunity from State game laws was a mere consequence of the federal "fence" around their reservation, which has now been removed.

The Treaty of 1854 ceded to the Menominees "as a permanent home" certain acreage "to be held as Indian lands are held," without further specification of the title intended or the appurtenant rights conveyed. That general language has been characterized as an attempt to "dodge the problem of defining the Indian estate" created. *Federal Indian Law* (1958),

p. 606. But whether they connote fee simple title or a lesser possessory estate, it seems clear that these words are a form of short-hand for that bundle of rights which had theretofore been commonly included in land transfers to Indian tribes. Thus, the failure to isolate hunting and fishing rights is not dispositive. On the contrary, the reference to the conditions under which "Indians lands are held" may well have intended to sum up in a single phrase the familiar provisions of earlier treaties which often included a prominent mention of hunting and fishing.[1]

At all events, it is unlikely that a grant of land to Indians a century ago would not have taken into account the fact that hunting and fishing was a well-known incident of Indian land tenure. Such a premise is all the more difficult in this instance. Indeed, hunting and fishing was (and still is) a most important aspect of the Menominee way of life (App. 10–11,

[1] See, *e.g.*, Treaty of January 3, 1786, with the Choctaw Nation, Art. 3, 7 Stat. 21, 22 ("lands allotted * * * to live and hunt on * * *"); Treaty of January 31, 1786, with the Shawanee Nation, Art. 6, 7 Stat. 26, 27 ("lands * * * to live and hunt on * * *"); Treaty of January 9, 1789, with the Wyandot, etc., Art. 3, 7 Stat. 28, 29 ("to live and hunt upon, and otherwise to occupy as they shall see fit"); Treaty of August 3, 1795, with the Wyandots, etc., Art. 5, 7 Stat. 49, 52 ("The Indian tribes * * * are quietly to enjoy [the lands], hunting, planting, and dwelling thereon so long as they please * * *"); Treaty of November 10, 1808, with the Osages, Art. 8, 7 Stat. 107, 109 ("to live and to hunt, without molestation, * * *"); Treaty of August 24, 1835, with the Comanche, etc., Art. 4, 7 Stat. 474, 475 ("free permission to hunt and trap"); Treaty of September 30, 1854, with the Chippewa, Art. 2, 10 Stat. 1109, 1110 ("for a fishing ground"); Treaty of June 11, 1855, with the Nez Percés, Art. 3, 12 State. 957, 958 (the "exclusive right of taking fish * * *").

43–44, 47–48, 55–56), and the reservation lands involved here were selected precisely because of their abundance of game. Accordingly, it seems a fair construction of the present grant that it meant to give assurance that the tribe would have not only the land itself but the right to hunt and fish within the reservation in their accustomed way.

It does not necessarily follow, however, that any immunity from outside regulation granted by the Treaty of 1854 must be held absolute. Thus, we think it clear that the United States, while it had jurisdiction over the reservation lands, could regulate hunting and fishing to the extent necessary to preserve the asset for the Tribe as a whole. So, also, we believe the government might have taken measures, if any were needed, to assure that the Indians did not unfairly deprive the other inhabitants of the country with respect to migratory birds or fish which passed through their lands. In short, the right involved is, in our view, akin to the privilege to hunt and fish at "usual and accustomed places" off the reservation conferred by many treaties—which, although superior to private rights and immune from some governmental interference, must yield to necessary regulation. See *e.g.*, *Ward* v. *Race Horse,* 163 U.S. 504; *United States* v. *Winans,* 198 U.S. 371; *Seufert Bros. Co.* v. *United States,* 249 U.S. 194; *Tulee* v. *Washington,* 315 U.S. 681. Of course, here, the right is exclusive, and the Tribe accordingly cannot be required to allow strangers onto its lands nor otherwise be compelled to share with others the wildlife resource found on

the reservation. But, in both situations, when the general public interest in conservation is shown to be imperiled if the Indians also are not brought under a particular generally applicable restriction, their special right to hunt and fish does not prevent it.

We conclude that the Court of Claims—like the Wisconsin courts in *Sanapaw*—went too far in construing the Treaty of Wolf River as conferring upon the Menominees an absolutely unrestrained right to hunt and fish, good against *all* outside regulation except only an exercise of the power of eminent domain. Even in 1854, we suppose, the concept of Indian reservations as quasi-sovereign "nations," beyond the reach of the white man's law, was already yielding to the more modern reality. See *Kake Village* v. *Egan*, 369 U.S. 60, 71–75. But, at all events, we do not believe the general terms of the Treaty need be read as creating an impenetrable "hunting ground" for all time. Thus, we think it plain that the kind of safety regulation involved in the *Sanapaw* case—a prohibition against transporting a loaded and uncased gun in an automobile—does not infringe the treaty right of the Menominees. So, also, the restriction against hunting deer with the aid of an artificial light is a probably necessary measure which does not overstep the line. It may be doubted whether the Treaty of Wolf River, however generously construed, can be read to insulate such modern practices, so distantly related to the Menominee way of life of 1854.

The grant to the Indians was clearly not a grant of sovereignty. Whatever rights it gave, it did not

wholly eliminate the exercise of governmental power. The Menominees cannot rightly complain if appropriate restrictions—such as might have been applied by the United States before termination—are now made applicable to them in the overall public interest.

B. THE TERMINATION ACT DID NOT DEPRIVE THE MENOMINEES OF ANY PROPERTY RIGHT CONFERRED BY TREATY

Assuming the Treaty of Wolf River conferred on the Menominees a special right to hunt and fish on the ceded lands, we agree with petitioners that the Termination Act of 1954 did not affect it. To be sure, although the suggestion was made, Congress did not expressly exempt hunting and fishing rights from the provision that, after effective termination, "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction" (see 25 U.S.C. 899, App. 35). But several considerations indicate that there was no intent to abrogate treaty rights, to the extent that the Indians held such rights.

First, while power to do so undoubtedly exists (*Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565–567), it is not lightly to be assumed that Congress intended to deny any right which may have been given to the Indians a century earlier. At least, that conclusion should be avoided in the absence of express language or some other unmistakable sign of intent. Cf. *Squire* v. *Capoeman,* 351 U.S. 1. Moreover, the suggestion that any rights that may find their support in the treaty were meant to be left unprotected against hostile State

laws is wholly at odds with contemporaneous congressional policy. Other enactments of the same Congress, the Termination Act applicable to the Klamath Reservation and Public Law 280 opening up other Indian reservations to State law, make clear that hunting and fishing rights guaranteed by treaty were not to be sacrified. See 25 U.S.C. 564m(b); 18 U.S.C. 1162(b).

No doubt, it is arguable that the absence of a like saving proviso in the Menominee Termination Act reveals a contrary intent here. But, as this Court observed, rejecting a comparable contention in *Metlakatla Indians* v. *Egan*, 369 U.S. 45, 57; "It would be sheer speculation to attribute significance to the imperfect parallelism * * *. The process of statutory drafting and evolution, here veiled from scrutiny, is too imprecise to permit such an inference." We think it more likely that Congress accepted the authoritative advice of Interior Department officials that treaty rights would survive the Termination Act even if it did not expressly mention them (see App. 13, 57–59; see, also, App. 21). Indeed, the statutory mandate directing that the termination plan should "contain provision for protection of * * * fish and wildlife" (25 U.S.C. 896, App. 34) suggests an understanding that these matters would not be fully regulated for the former reservation lands by State conservation laws.

Finally, and of great importance we believe, it is not likely that the Congress would knowingly expose the United States to a claim for compensation by destroying property rights conferred by treaty—especially

while it was purporting to sever the government's financial obligation toward the Indians.

C. THE UNITED STATES IS NOT LIABLE FOR STATE-IMPOSED RESTRICTIONS ON HUNTING AND FISHING WHICH DO NOT IMPAIR PROPERTY RIGHTS CONFERRED BY TREATY

For the reasons just stated, we contend that the Court of Claims was correct in holding that whatever property right in the wildlife of the reservation may have been secured to the Tribe in 1854 survived the Termination Act of 1954 and its implementation in 1961. Since petitioners agree that on this hypothesis—which they urge upon this Court—the United States owes them nothing, we might stop here. However—unlike petitioners and the court below—our conclusion that the treaty rights of the Menominees remain unimpaired does not lead us to say that they necessarily enjoy today the same uninhibited freedom to hunt and fish as they did a century ago, or that they are now entitled to follow all of the practices that they were utilizing in 1961. Since any difference may be attributable, at least indirectly, to the Termination Act, the question may arise whether the United States is accountable in damages for this result.

As we have suggested, the substitution of State jurisdiction over the reservation lands for the former federal supervision may have important practical consequences—because, unlike the federal authorities who did not exercise their power to regulate, the local government apparently intends to use its prerogatives. We assume, of course, that the State can restrict hunting and fishing on the Menominee lands to no greater

extent than the national government might have, consistently with the Treaty of Wolf River. But, as we have said, the rights granted by the treaty, whatever their scope, never precluded a degree of outside regulation of hunting and fishing for limited purposes. And it is that power of regulation, unused in federal lands, that has now been transferred to the State. Plainly, the mere transfer of jurisdiction works no "taking" or other legal injury, even if the transferee proposes to use it differently. So long as the treaty right is respected, there can be no legitimate cause for complaint if Wisconsin chooses to hem it in as closely as possible without invading it. Of course, the United States is not responsible if the State oversteps the line; but other remedies are available to prevent it. Cf. *Puyallup Tribe* v. *Department of Game,* No. 247, *Kautz* v. *Department of Game,* No. 319, O.T., 1967, certiorari granted December 18, 1967.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HAROLD S. HARRISON,
Acting Assistant Attorney General.
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
Attorney.

DECEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967